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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Marriage of THOMAS WILLIAM ZOLEZZI and DEIDRA AUSTIN ZOLEZZI.	H037381 (Santa Cruz County Super. Ct. No. FL029607)
THOMAS WILLIAM ZOLEZZI, Respondent, v. DEIDRA AUSTIN ZOLEZZI, Appellant.	

Appellant Deidra Austin Zolezzi appeals from a trial court's order denying her motion to set aside the judgment of dissolution of her marriage to respondent Thomas William Zolezzi. Deidra sought to set aside the judgment pursuant to Family Code section 2122[1] on the grounds that Thomas breached his fiduciary duties and committed fraud by failing to disclose approximately $114,000 of additional tax refunds generated by a net operating loss from one of Thomas's investments. After an oral hearing, the trial court denied Deidra's motion to set aside the judgment. For reasons set forth below, we find that the trial court did not abuse its discretion in denying Deidra's motion, and will therefore affirm its order.

[1] All further unspecified statutory references are to the Family Code.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to their marriage in 2000, Thomas and Deidra entered into a prenuptial agreement agreeing that Thomas's and Deidra's separate property before marriage would remain separate property after marriage and upon dissolution of marriage. Thomas had earlier received an inheritance consisting of real property located in Imperial County, California at some point before he married Deidra.[2] In January 2007, Thomas sold the real property in Imperial County and deposited the proceeds into his separate Charles Schwab account. Thomas thereafter invested the proceeds, totaling $500,000, in Kenmark Ventures LLC (Kenmark). The $500,000 was drawn directly from Thomas's separate Charles Schwab account to Kenmark.

The Initial Dissolution

Thomas filed for dissolution on November 19, 2009. On May 27, 2010, Thomas signed and submitted a preliminary declaration of disclosure detailing his financial assets and liabilities. The disclosures included an income and expense declaration, which listed Thomas's debts, liabilities, income, and tax information including his tax refund. Thomas disclosed, under the section for tax refunds, that he received a 2008 tax refund in the amount of $14,862. According to Thomas's preliminary declaration, Deidra cashed this refund. No mention was made of any potential refund or liability due to the parties' joint 2009 tax refund.

Both parties negotiated several agreements during June and July 2010, which divided some property and determined other issues such as child support and visitation.[3]

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[2] Facts concerning this separate property are taken from Thomas's verified declaration dated April 14, 2011, which he signed under penalty of perjury.

[3] The first stipulated order was entered on June 1, 2010, regarding parenting plans and temporary custody. The second stipulated order was entered on July 21, 2010, which dealt with the division of some of the parties' assets, and other issues such as custody and visitation rights. These agreements are not relevant to the parties' appeal, as neither deals with the issue of the 2009 tax refund.

On August 20, 2010, both parties agreed to a property division stipulation (hereafter August 2010 stipulation) that stated in relevant part: "Any tax refund associated with the joint filing of the 2009 taxes shall be divided equally by the parties. Jurisdiction is reserved over the division of any taxes remaining owing for the 2009 calendar tax year."

The Joint 2009 Tax Return

Deidra received a copy of the joint 2009 tax return on October 15, 2010, three hours before the filing deadline. The joint 2009 tax return reflected that there would be a $500,000 net operating loss from the Kenmark investment (hereafter Kenmark loss), and that the parties would receive a $34,000 tax refund due to the loss from Kenmark. After receipt of the tax returns, Deidra contacted the parties' CPA, Sheryl Hinshaw, through e-mail inquiring about the tax return. Hinshaw replied to the e-mail, stating that "[a]s we discussed on the phone, no tax is due and there is a refund of approximately $25k federal and $9k state. You asked if there was anything unusual about the return. The return for [2009] is very similar to prior [years' returns] . . . . One item that is new to this return year is the addition of a partnership investment, Kenmark, that generated a K-1 and a passthrough loss of $500k. The loss is generally the reason for the resulting tax refunds." Hinshaw did not provide any other details regarding the nature of the loss or the existence of any additional tax returns. She also requested that Deidra provide an authorization that day, as the returns would be delinquent if not filed by October 15, 2010. Included in the joint 2009 tax return was a schedule, form 1045, titled "Application for Tentative Refund" showing a decrease in tax for the years 2004 and 2005 "after carryback."

Deidra and Thomas, through their attorneys, negotiated and agreed that Deidra's attorney would retain the 2009 tax refund in his trust account "should there be no agreement to its division before it is received." Shortly thereafter, and several hours after her initial receipt of the returns, Deidra authorized the filing of the joint 2009 tax return via e-mail to Hinshaw. Deidra further stated to Hinshaw in her authorization e-mail that she would "work on finding a CPA next week and have them evaluate the returns from a

legal/divorce perspective and then get back to you." Both parties, through their respective attorneys, continued negotiations on the division of the $34,000 refund for several months thereafter.

On January 13, 2011, the parties filed a "Stipulation and Order Regarding Spousal Support and Remaining Financial Issues" (hereafter January 2011 stipulation) with the trial court. This stipulation outlined the division of some of the parties' assets, and addressed the issue of the 2009 tax refund in a section titled "Financial Issues." The agreement stated that the parties received a 2009 tax refund of $25,093 for federal taxes and $18,700 for state taxes. The agreement further explained that the state refund included a $9,000 sum that was a double payment made by Thomas to the State of California. The agreement also outlined that Thomas was to receive the $9,000 double payment sum directly, and that the remaining balance of the approximately $34,000 refund "shall be divided equally between the parties."

The January 2011 stipulation further provided that "[Deidra] shall make no further claims nor shall be entitled to any assets or funds, whether separate or community, including . . . any past or future income tax refunds whether based on original filings or amended filings . . . ." The parties thereafter agreed that the January 2011 stipulation concluded all financial issues between them, and that Thomas would "forthwith prepare a judgment terminating the status between the parties which judgment incorporates this stipulation [and] order and previously executed stipulations and orders."

Thomas never filed any augmentation to his preliminary declaration of assets and liabilities. However, both parties signed and agreed to a stipulation and waiver of a final declaration of disclosure in March 2011. This stipulation and waiver declared that both parties agreed that they both complied with the preliminary declaration requirement under section 2104, and that both parties "have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information on [¶] (1) the characterization of all assets and liabilities, [¶] (2) the valuation of all assets

that are community property or in which the community has an interest, and [¶] (3) the amounts of all community debts and obligations." Thomas prepared and signed a document titled "Stipulation for Entry of Judgment" on February 17, 2011. Deidra also signed this stipulation for entry of judgment on March 1, 2011.

Additional Tax Refunds Generated by the Kenmark Loss

On March 9, 2011, Deidra sent an e-mail to Hinshaw inquiring about a packet she received earlier from Hinshaw's accounting firm, which contained amended tax returns for the years 2004 through 2006. The total amount of the additional refunds requested for the previous years was approximately $114,000.[4] Deidra's e-mail stated that she was "quite surprised" and that she "originally assumed this was the mandated annual tax exchange but it was not[,] it referenced a further tax refund from 2009." Deidra went on to summarize a phone call made between Hinshaw and Deidra that same afternoon, in which Deidra claimed Hinshaw explained that if "the loss from a particular year is too large, the federal government (not state) allows you to go back up to five years prior to when there was income and declare a loss against that income. Thus, [Hinshaw] declared [the Kenmark loss] against [Deidra and Thomas'] 2004 tax returns."[5] Deidra alleged that

[4] For clarity, we will hereafter refer to these additional refunds, which resulted from the Kenmark asset's net operating loss, as the "additional 2009 tax refunds." Additionally, neither party included copies of the amended tax returns from 2004 through 2006. The amount of the additional tax refunds (approximately $114,000) is therefore taken from Deidra's opening brief, as Thomas did not refute the accuracy of this figure in his reply.

[5] Thomas argues in his reply brief that this e-mail, along with several other exhibits Deidra attached to her motion to set aside, should be excluded on appeal, as he objected to the admission of this correspondence in the trial court. Nonetheless, the trial court failed to make a ruling on his evidentiary objections, and accordingly these arguments are deemed waived on appeal. (See *Van Dyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310, 1318 ["[Respondent] also claims the press release was completely unauthenticated, but if it objected on this ground in the trial court, it failed to obtain a ruling on its objection, waiving the claim on appeal."].)

Hinshaw told her over the phone that Hinshaw did not mean to say that there were no other liabilities or money due from the 2009 tax return when they previously spoke in the fall of 2010 (when the original 2009 tax return was prepared) and that Hinshaw stated she started working on the additional tax refunds in October 2010 and began preparation of the tax returns in December 2010.

On March 28, 2011, the trial court entered the judgment of dissolution pursuant to the signed stipulation for entry of judgment. The judgment of dissolution stated that it finalized the parties' separation and ordered that the parties' property division be set forth by the various stipulations and orders the parties previously entered into, including the August 2010 and January 2011 stipulation orders.

On March 21, 2011, Deidra sent an e-mail to Thomas's attorney stating she would not sign the amended tax returns unless it was agreed that "all refunds and offsets that arose as a result of joint filings during the tenure of the marriage be split equally."

Order to Show Cause and Motion for Set Aside of the Judgment

Thomas's attorney filed an order to show cause on April 25, 2011, requesting an order from the court directing Deidra to sign the amended tax returns.[6] In response, Deidra filed a motion for attorney fees and costs, protective order, and set aside a portion of the judgment, fees and costs (hereafter motion to set aside) on May 24, 2011. Deidra alleged that Thomas breached his fiduciary duties under section 721, and argued that Thomas committed fraud by deliberately concealing the existence of additional tax

[6] Thomas requested a total of six orders from the superior court. He also requested an order that the net operating loss from the Kenmark property be confirmed as his separate property; an order that half of the total refunds be disbursed immediately; an order that a time limit of 30 days be imposed on Deidra for her to file pleadings she deems appropriate to prove she is entitled to half of the additional 2009 tax refunds; an order confirming that all of the residential energy credit carryover, all of the 2009 charitable contribution carryover, and all of the minimum tax credit be deemed his separate property; and an order reserving petitioner's right to seek fees and sanctions against Deidra.

refunds from her as they negotiated the division of the 2009 tax refund. Deidra also argued that Thomas failed to fully augment his preliminary disclosures of income, assets, and liability to reflect the additional tax refunds. On June 7, 2011, Deidra also filed a responsive declaration to Thomas's order to show cause. She alleged again that Thomas hid the additional tax refunds from her, and that in doing so he breached his fiduciary duty to her under section 721.

Thomas filed a reply memorandum on June 10, 2011, addressing both Deidra's motion for set aside of the judgment and her response to his order to show cause. In his reply, Thomas asserted that the Kenmark investment was his separate property. As a result, Thomas claimed that the resulting "net operating loss, an asset for tax purposes," was also "[his] separate property." Thomas also disputed Deidra's allegation of fraud, arguing that he never failed to disclose information to Deidra and that she was in possession of the joint 2009 tax return from mid-October to December 2010, which is when the parties ultimately signed the agreement regarding the division of the 2009 tax refund. Deidra filed a response to Thomas's reply on June 13, 2011.

Both parties presented oral argument to the trial court in a hearing on June 20, 2011. Thomas argued that given both the Kenmark investment's nature as his separate property and the fact that Deidra signed the January 2011 stipulation disavowing any potential claims to past, present, or future tax refunds, the court could reach no other conclusion than to grant his orders requiring Deidra sign the amended tax returns. Deidra maintained her position that Thomas breached his fiduciary duties and deliberately concealed the existence of the additional 2009 tax refunds.

Findings and Order by the Trial Court

At the conclusion of the oral arguments, the trial court entered a ruling on both Thomas's order to show cause and Deidra's motion for set aside of the stipulated judgment. In its oral ruling, the court stated that both parties "discussed the motions voluminously" and that its ruling was based on consideration of both parties' written

declarations and motions. The court denied Deidra's motion to set aside a portion of the judgment and protective order, ordered both parties to pay their own attorney fees, and granted Thomas's order requiring Deidra to sign the 2004 through 2006 amended tax returns. The court entered a written findings and order after hearing on August 24, 2011, which followed its oral ruling.

In its written order, the trial court further ruled and confirmed the Kenmark loss as Thomas's separate property, and ordered that all refunds be disbursed to Thomas immediately as his own separate property. The court's order did not further specify any factual findings regarding Thomas's alleged breach of duty.

STANDARD OF REVIEW

Deidra contends on appeal that this court should apply a de novo standard of review to the trial court's refusal to grant her motion to set aside a judgment in a dissolution proceeding pursuant to section 2122. Nonetheless, pursuant to established case law, we will review the trial court's ruling for abuse of discretion. (See *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682-683 (*Rosevear*); *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 (*Varner*).) Accordingly, we may not "merely substitute [our] own view as to the proper decision: '[T]he showing on appeal is wholly insufficient if it presents a state of facts . . . which . . . merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " (*Varner, supra,* at p. 138.)

A trial court's order granting or denying a motion to set aside judgment under section 2122 "will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice." (*Rosevear*, *supra,* 65 Cal.App.4th at p. 682.) "A proper exercise of judicial discretion requires the exercise of discriminating judgment within the bounds of reason, and an absence of arbitrary determination, capricious disposition, or whimsical thinking." (*Id.* at pp. 682-683.) The burden of proving discretion abuse by the trial court is on the party

claiming it. (*Id.* at p. 682.) We therefore review the trial court's order with this deferential standard of review in mind.

DISCUSSION

1. *Governing Law*

Fiduciary Duties Between Spouses

Section 721 sets forth the fiduciary duty between spouses. Specifically, section 721, subdivision (b) provides that "in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners . . . ."

This fiduciary duty continues, even as the spouses negotiate dissolution and separation proceedings. Section 2102, subdivision (a), provides that "[f]rom the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including . . . . [¶] (1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes."

The Fiduciary Duty Extends to Disclosure of Assets During Dissolution

Chapter 9 of the Family Code deals with the disclosure of assets and liabilities between separating spouses. The legislative intent is made clear in section 2100, as the statute reads that the "Legislature finds and declares" that "[s]ound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant

costs by fostering full disclosure and cooperative discovery," and that "[i]n order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage . . . regardless of [the asset's] characterization as community or separate . . . . Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues . . . each party will have a full and complete knowledge of the relevant underlying facts."

Accordingly, in a dissolution proceeding each party is generally required, absent certain exceptions set forth in the statute, to serve on the other party a preliminary declaration of disclosure, executed on "penalty of perjury on a form prescribed by the Judicial Council." (§ 2104, subd. (a).) This preliminary declaration is not filed with the court, except on court order, though the parties must file proof of service with the trial court. (*Id*. subd. (b).) These preliminary disclosures must be "set forth with sufficient particularity, that a person of reasonable and ordinary intelligence can ascertain, all of the following: [¶] (1) The identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate. [¶] (2) The declarant's percentage of ownership in each asset . . . ." (*Id*. subd. (c).) Each party may amend his or her preliminary declarations without leave of the trial court, though he or she must file proof of service with the court. (*Id*. subd. (d).)

Pursuant to section 2104, the parties must also file a final declaration of disclosure, documenting their assets and liabilities, executed under penalty of perjury, before or at the time the parties enter into an agreement resolving property or support

issues. (§ 2105, subd. (a).) The parties may stipulate to a mutual waiver of the final declaration of disclosure, as Deidra and Thomas did.[7] (*Id*. subd. (d).)

Grounds for Setting Aside a Judgment

If the trial court enters a judgment in a dissolution proceeding when the parties failed to comply with all the disclosure requirements set forth above, the trial court "shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error." (§ 2107, subd. (d).) Section 2122 sets forth six grounds for a party to base a motion to set aside a judgment: "(a) Actual fraud . . . . [¶] (b) Perjury. . . . [¶] (c) Duress. . . . [¶] (d) Mental incapacity. . . . [¶] (e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake of fact. . . . [¶] (f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought

[7] This mutual waiver must be executed under penalty of perjury and must include the following representations: "(1) Both parties have complied with Section 2104 and the preliminary declarations of disclosure have been completed and exchanged. [¶] (2) Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses. [¶] (3) Both parties have fully complied with Section 2102 and have *fully augmented the preliminary declarations of disclosure*, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or which it is contended the community has liability. [¶] (4) The waiver is knowingly, intelligently, and voluntarily entered into by each of the parties. [¶] (5) Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment." (§ 2105, subd. (d), italics added.) Deidra and Thomas both signed a waiver of the final declaration of disclosure which comported with the above requirements.

within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply."

In addition to finding one of the enumerated grounds for a motion to set aside a judgment, before granting relief the trial court must also "find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." (§ 2121, subd. (b).) Furthermore, a judgment may not be set aside under section 2122, or under any other law, "simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, or the support to become inadequate." (§ 2123.)

2. *Analysis*

On appeal, Deidra claims that the trial court erred in denying her motion to set aside the judgment pursuant to section 2122. She claims that Thomas breached his fiduciary duties and failed to adequately augment his initial asset disclosure immediately upon discovery of the additional 2009 tax refunds on a judicially-approved form. Deidra also contends that she had no duty to "investigate" the tax returns, and since Thomas was in a "superior position" to her with regards to the refunds he should have explicitly disclosed the information to her. Lastly, she contends that this court should award her with one-half of the additional 2009 tax refunds, or with the entire amount of the additional 2009 tax refunds if this court were to find that Thomas committed fraud and perjury.

Thomas's Failure to Disclose the Additional 2009 Tax Refund

Deidra argues that the trial court abused its discretion in denying her motion to set aside the judgment under section 2122, contending that Thomas failed to augment his initial disclosures to include the 2009 tax refunds pursuant to section 2100. Thomas argues that he fully augmented and disclosed his assets, and asserts that there is no clearer augmentation and disclosure than the actual joint 2009 tax return itself, which Deidra was

in possession of for two and a half months before they signed the joint stipulation in January 2011 disposing of the approximately $34,000 in initial tax refunds.

Deidra contends on appeal that *Varner* is instructive. In *Varner*, the appellate court reversed the trial court's order denying the *Varner* wife's motion to set aside the judgment, as there was ample evidence that the husband undervalued assets in his testimony before the trial court and also prohibited access to documents from the wife's accountants. (*Varner*, *supra*, 55 Cal.App.4th at pp. 143-144.) However, *Varner* is not wholly analogous to this case, as unlike the wife in *Varner*, Deidra was not prohibited from gaining access to the joint 2009 tax return, nor did Thomas explicitly undervalue the amount of the tax refunds in front of the trial court.

Deidra additionally argues that *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470 (*Feldman*) is similar, where the Fourth Appellate District affirmed the trial court's order awarding sanctions under section 2107[8] against a husband for failing to disclose assets to his wife. (*Feldman*, *supra*, at p. 1498.) In *Feldman*, the husband failed to disclose a $1 million bond on his schedule of assets, failed to produce documents about the transaction of the bond, failed to disclose his acquisition of a multimillion dollar home, and failed to disclose the existence of a 401(k) account. (*Id.* at pp. 1481-1488.) With specific respect to the 401(k) account, the husband initially argued that he did not breach his fiduciary duty of disclosure because his wife had been secretly copying financial documents during the course of their marriage, and thus had copies of certain statements for the 401(k) account. There, the court determined that this did not exonerate the husband from his "failure to disclose the information about the 401(k) account on the

[8] Section 2107 provides remedies for spouses if one spouse fails to provide a preliminary declaration of disclosure, final declaration of disclosure, or fails to provide required information with sufficient particularity. Under section 2107, the complying party may file a motion to compel, and the court may also award sanctions and attorney fees. (§ 2107, subd. (c).) Deidra did not file a motion to compel, nor did she seek attorney fees or sanctions pursuant to section 2107.

Schedule or to produce documents concerning the account in response to [wife's] request for production," and that " '[a] spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse' and should not expect the spouse who is not in a superior position to search for that information." (*Id.* at pp. 1487-1488, quoting *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1348 (*Brewer*).)

Deidra cites to *Brewer* in support for her contention that Thomas was in a "superior position" with regards to the 2009 refunds, and that she was not required to investigate or search for the information herself. In *Brewer*, the wife's attorney prepared a final declaration of disclosure that included a schedule of assets and debts. (*Brewer, supra*, 93 Cal.App.4th at p. 1338.) This schedule valued the wife's NBC pension as "unknown," her GE stock options as "unknown," and also attached two pages of an annual statement supplied by NBC which showed that as of 1996 the NBC Savings and Security Program had a value of $168,561. (*Ibid.*) At the time the parties signed the final declaration of disclosure, the husband believed wife had one pension plan with an approximate value of $170,000. (*Id.* at p. 1339.) The husband thereafter filed a motion to set aside the judgment, in part citing to the fact that the value of the wife's NBC pension plan was approximately more than $270,000 and that she also had a NBC Savings and Security program valued at $168,561. (*Id.* at pp. 1339-1340.) The value of the NBC Savings and Security program was ascertained through the company's 1996 annual statement, part of which was attached to the wife's final declaration of disclosure. (*Id.* at p. 1340.) The wife in *Brewer* opposed the motions by stating that she valued the NBC pension as "unknown" because she "had not known its value," and that she "had not attempted to hide anything, as she acknowledged she had two retirement plans through her employer." (*Ibid.*) The trial court ordered the judgment and marital settlement agreement set aside, and wife appealed. (*Id.* at p. 1342.)

The appellate court affirmed the trial court's determination, finding that the court did not abuse its discretion in setting aside the judgment and marital settlement agreement based upon mistake.[9] (*Brewer, supra*, 93 Cal.App.4th at p. 1349.) The court noted that a spouse's fiduciary duty to disclose all material facts and information regarding the valuation of all assets contended to be community property or which were community property "arise without reference to any wrongdoing." (*Id.* at p. 1344.) The court found fault with the wife's contention that she made no mistake because "she met her disclosure obligations by fully disclosing the *existence* of both pension plans, the information known to her, and information from which the assets could be valued." (*Id.* at p. 1347.) The court also found fault with the wife's other contention, that the husband neglected his legal duty to value the pension plans. (*Ibid.*) The court found the wife's arguments "overlook[ed] the fact that the Family Code imposes fiduciary obligations on both parties. One obligation is to make full, accurate, and complete disclosure, including the continuing duty to update and augment information." (*Id.* at p. 1348.)

Like the wife in *Brewer*, Thomas failed to disclose all material facts and information regarding the additional 2009 refunds. His argument that Deidra's possession of the joint 2009 tax return itself fulfilled his fiduciary duty of disclosure is analogous to the *Brewer* wife's argument that her disclosure of the existence of the two pension plans, one by an attachment of NBC's 1996 annual statement that stated the value of the Savings and Security plan, was adequate. Thomas's argument ignores the fact that a breach of fiduciary duty of disclosure may arise without any wrongdoing. Though there is no evidence that Thomas deliberately withheld information, or that he

[9] The parties in *Brewer* began their dissolution action in 1998, with discovery and motions continuing into 1999. (*Brewer, supra*, 93 Cal.App.4th at pp. 1339-1342.) At the time the *Brewer* parties engaged in their dissolution action, section 2122 only provided for *five* grounds for a motion to set aside a judgment. Subdivision (f) of section 2122, providing for grounds to set aside a judgment based upon failure to comply with disclosure requirements, was not enacted until 2001. (Stats. 2001, ch. 703, § 7.)

misled or otherwise fraudulently deceived Deidra, there is ample evidence in the record that he also failed to completely and adequately disclose the existence of the additional 2009 tax refunds.

As the court in *Brewer* noted, spouses have continuing fiduciary duties to each other to fully and accurately disclose information about the value of community assets, or the value of assets in which the community is contended to have an interest. (§ 2100.) The legislative intent of imposing such a fiduciary duty on spouses is encapsulated in the Family Code itself, such that this full disclosure is required so "that at the time the parties enter into an agreement for the resolution of any of these issues . . . each party will have a full and complete knowledge of the relevant underlying facts." (*Id*. subd. (c).) This is to promote the public policy to further reduce the "adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery." (*Id*. subd. (b).) Given the August 2010 stipulation dividing any tax refunds associated with the joint 2009 tax return equally, and given the parties' extended negotiations in the fall of 2010 about the division of the 2009 tax refunds, it seems that the record is clear that any tax refunds associated with the joint 2009 tax return were assets in which it was contended the community held an interest.

Nonetheless, Thomas relies on *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712 (*Burkle*), and argues that *Burkle* stands for the proposition that a spouse who decides to forego an investigation and accept a proposed settlement may not later avoid that settlement in the absence of a misrepresentation or concealment of material facts, an argument he raised before the trial court. (*Id.* at pp. 741-742.)

In *Burkle*, the court considered the enforceability of a postmarital agreement. (*Burkle*, *supra*, 139 Cal.App.4th at p. 717.) The parties in *Burkle* married in 1974, and started proceedings to dissolve their marriage in 1997. (*Id.* at p. 718.) The parties entered into a postmarital agreement in November 1997 which outlined the division of property if either party sought dissolution of the marriage, amongst other items. (*Id.* at

pp. 719-724.) The wife in *Burkle* then sought to dissolve their marriage, filing a petition which also asserted that their postmarital agreement was void and unenforceable, arguing that she was so depressed and emotionally dependent on her husband that she did not sign the agreement out of her own free will, and that her husband concealed assets and significant financial information. (*Id.* at p. 723.) Ms. Burkle's main argument was that her husband concealed the existence of two mergers that he was working on at the time the postmarital agreement was being negotiated. (*Ibid.*) The two mergers were closed after Ms. Burkle signed the postmarital agreement. (*Id.* at p. 724.)

The trial court thereafter found that Mr. Burkle "made all relevant financial information to Ms. Burkle's attorneys and accountants for inspection and review, and Ms. Burkle was free at all times to have her representatives review and investigate that information. Her decisions regarding the scope and extent of investigations, including her decision to limit the scope, were freely made, with the advice of her attorneys . . . ." (*Burkle*, *supra*, 139 Cal.App.4th at p. 725.) The trial court further found that Mr. Burkle had fulfilled his fiduciary duties by making a full disclosure of all their assets, and that though the mergers were not on the schedule of assets, they were discussed and known to Ms. Burkle. (*Id.* at pp. 726-727.)

The appellate court affirmed the trial court's order, finding no authority to suggest "that, as a matter of law, Mr. Burkle was required to provide Ms. Burkle with written details about a contemplated merger--the prospect of which was known to and had been discussed previously among the parties and counsel--in order to fulfill his fiduciary duty of full and fair disclosure." (*Burkle*, 139 Cal.App.4th at p. 743.) The court further found that the "pertinent rule is that a spouse who forgoes investigation and accepts a proposed settlement 'may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts.' " (*Id.* at p. 741.)

Here, like the two parties in *Burkle*, Deidra was well aware of the $500,000 net operating loss, as she was informed explicitly of its existence by Hinshaw. Furthermore,

like the wife in *Burkle*, she was given full access to all of the relevant financial documents, namely the joint 2009 tax return, from which she could have gleaned the existence of additional 2009 tax refunds. Deidra even went so far as to inform Hinshaw that she intended to seek an outside review of the tax returns so she could analyze them from a divorce perspective. As Thomas argued below in the trial court and here on appeal, the parties' joint 2009 tax return included several schedules that indicated that additional refunds would be taken. Specifically included in the tax return was a schedule (form 1045) labeled "Application for Tentative Refund," with amounts shown on the bottom of the form indicating "decrease in tax."

As previously discussed, *ante*, this court must analyze the trial court's order denying Deidra's motion to set aside the judgment under the deferential abuse of discretion standard of review. Accordingly, we may not "merely substitute [our] own view as to the proper decision: '[T]he showing on appeal is wholly insufficient if it presents a state of facts . . . which . . . merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " (*Varner*, *supra*, 55 Cal.App.4th at p. 138.) While it may appear that the trial court could have reasonably granted Deidra's motion given the holding in *Brewer*, under *Burkle* it was similarly reasonable for the court to deny her motion to set aside. Akin to the wife in *Burkle*, Thomas gave Deidra full access to the tax returns, and both parties spent several months negotiating about the 2009 tax refunds while represented by counsel. Deidra additionally does not present evidence that Thomas fraudulently concealed information from her, or that he withheld access to financial documents. Accordingly, though Deidra has presented a set of facts that affords an opportunity for a difference of opinion, Deidra fails to demonstrate that the trial court abused its discretion in that its decision was arbitrary or capricious.

Deidra Waived Argument that Disclosures Must Be on Judicial Council Forms

Deidra additionally argues that all disclosures and augmentation of assets must be made on a judicially-approved form, such as a Judicial Council form. Notably, section 2104, subdivision (a) specifies that *preliminary* disclosures need to be listed on a Judicial Council form, but the section does not specify that *augmentations* need to be disclosed on a form. Nonetheless, it appears that Deidra failed to raise this contention below, as this argument is not advanced in any of her moving papers before the trial court. It is established that a party generally may not assert an issue on appeal unless it was raised below. Accordingly, when an appellate "theory was never presented to the trial court," it is forfeited. (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776.) We will therefore decline to address the merits of this claim.

The Record Contains No Evidence of Fraud

Deidra alleged in the trial court and on appeal that Thomas engaged in fraudulent behavior. She further alleges on appeal that as a result of his allegedly fraudulent behavior, she is entitled to the entire amount of the additional 2009 tax refunds, relying on *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34 (*Rossi*). The wife in *Rossi* intentionally concealed lottery winnings from her husband by failing to disclose her winnings and by having the checks mailed to her mother's home. (*Id.* at p. 36.) The judgment of dissolution was entered in 1997, and the husband filed for bankruptcy in 1998. (*Id*. at p. 38.) In 1999, the husband received a letter in the mail from the lottery commission asking if the wife would be interested in a lump sum buyout of her lottery winnings. (*Ibid.*) This was the first time the husband learned of her earnings, and he subsequently filed a motion to set aside the judgment pursuant to section 1101,[10] alleging

[10] Section 1101 provides remedies for spouses who breach their fiduciary duty during marriage, causing impairment to the injured spouse's one-half interest in the community estate.

fraud. (*Rossi*, *supra*, at p. 38.) The trial court ruled in favor of the husband, awarding him 100 percent of the lottery winnings pursuant to section 1101, subdivisions (g) and (h). (*Rossi*, *supra*, at p. 39.) The order was affirmed by the appellate court. (*Id.* at p. 44.)

Rossi is inapplicable to Deidra's case, as she has not shown any evidence of fraudulent misrepresentation or concealment, as previously discussed *ante.* Unlike the wife in *Rossi*, Thomas did not affirmatively conceal information and did not make false representations about the value of any of his assets, and there is no evidence in the record to support Deidra's claim of fraud. We accordingly reject Deidra's argument that under *Rossi*, she is entitled to all of the additional 2009 tax refunds.

DISPOSITION

The order of the family court denying Deidra's motion to set aside the judgment is affirmed. Thomas is awarded his costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.